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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 11

STATE OF OHIO,
Plaintiff-Appellee,
against
NICO JACOBELLIS,
Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM ORDER APPEALED FROM.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM ORDER APPEALED FROM.

Leave having been granted by this honorable Court, and, under the provisions of Rule 16, this Appellee moves that the appeal be dismissed, or, in the alternative, that the order appealed from be affirmed on the following grounds:

(a) The appeal is not with the jurisdiction of this honorable Court, because not taken in conformity to the rules of this Court.

(b) The appeal does not present substantial federal questions.

(c) Federal questions sought to be reviewed were not timely or properly raised, or expressly passed on.

(d) The judgment rests on an adequate non-federal basis.

The foregoing grounds are discussed, both as to fact and as to law, in the accompanying brief in support of the motion.

July 27, 1962

Respectfully submitted,

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BRIEF OF APPELLEE.

OUTLINE OF THE CASE.

The Appellant was manager of The Heights Art Theatre at Cleveland Heights, Ohio, since 1955. As such, he was supervisor of the entire physical operation, in charge of advertising, publicity, promotion, and the scheduling of films; and supervisor of personnel, maintenance, repairs, and screening.

With reference to "The Lovers," the motion picture in issue, he arranged for the appearance of advertisements in the November 11, 1959, issue of a local daily afternoon newspaper *The Cleveland News* and in the November 12th issue of the only local morning newspaper *The Cleveland Plain Dealer* containing the following: "When all conventions explode * * * in the most daring love story ever filmed." (See Appendix 14). In addition, he arranged for the insertion of an advertisement in *The Cleveland News* issue of November 12th that carried this language: "One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (See Appendix 15). The Appellant also arranged for the insertion of an advertisement in *The Cleveland Press* (the other local daily afternoon newspaper) issue of November 12th and in *The Cleveland News* issue of November 13th and in *The Cleveland Plain Dealer* issue November 13th with the words: "Something of a sexual revolution appears to be going on in the cinema and Malle (director of 'The Lovers') may well be one of the prophets." (See Appendices 16, 17, and 18).

The Appellant privately exhibited "The Lovers" in a screening room on November 10, 1959, to motion picture critics of *The Cleveland Plain Dealer*, *The Cleveland News*,

and of *The Cleveland Press*. He read the review of the film in *The Cleveland Press* on November 11th wherein the critic wrote that the photography was "wholly obscene so far as common decency is concerned."

During the daytime hours of November 12th, a detective captain of the local police department telephoned the Appellant, who affirmed that he intended to begin the public exhibition of the film that same evening, and that, having viewed the movie on two occasions, he could see nothing wrong with it. The motion picture was in fact publicly shown twice that evening to hundreds of persons, among whom at the first showing was the above-mentioned detective captain. He concluded that the film was obscene.

On the following day, the officer conferred with the local chief of police, the city law director, and the county prosecutor. Prior to the commencement of the public showings on November 13th, the Appellant read the review of the film in *The Cleveland Plain Dealer* entitled "Full Condemnation for 'The Lovers,'" wherein the critic described it as filth, referred to its shockingly nasty climax, mentioned its appeal to the prurient-minded, and called it "a dull picture until it turns to screened pornography, and then it becomes nauseous." (See Appendix 19).

During the second of two showings of the movie under the supervision of the Appellant during the evening of November 13th, at which approximately 350 persons were in attendance, the local police halted the exhibition, confiscated the film, and arrested the Appellant. In due course, he was indicted by the County Grand Jury on counts of knowingly possessing and controlling and exhibiting an obscene motion picture film on or about November 13, 1959, the Grand Jury having viewed the movie before returning the indictment.

The three-judge trial court, the three-judge district appellate court, and the seven-judge highest court of the state subsequently saw the picture.

Witnesses at the Appellant's trial testified that "The Lovers," taken as a whole, has sex as its domiant theme; it deals with that theme in such a manner as to arouse lustful thoughts and desires in the average person, taking into consideration the contemporary community standards; the whole picture is directed toward the sexual expression; in the bedroom scene, the leading female character was experiencing a sexual stimulation and gratification (an orgasm); it was shocking; the sex act performed was abnormal; and that the movie came out of the "New Wave" of French directors who are exploiting sex, violence, and perversion on the ground that such subjects are the only ones that are current money makers.

It was further testified that the entire purpose of the film was to lead up to one scene; the rest was merely *decor* to enable people to view it and not be altogether ashamed to view it; the dominant theme of sex was manifested in many instances, including the female lead's costuming, the action with the male lead in the boat scene, the disrobing of both man and woman, and the sequences in the bathtub and on the bed.

Before being permitted to be exhibited anywhere in the state of New York, the movie was "cut." It underwent deletions at the hands of the theater manager in Memphis, Tennessee. Only the censored version was permitted to be shown in Providence, Rhode Island, and in Boston, Massachusetts. Showings were stopped by the police in Portland, Oregon, and in Dayton, Ohio. The Dayton action led to criminal prosecution in which the theater manager was found guilty of exhibiting obscenity, but, on appeal, was discharged when the Supreme Court of Ohio found the

non-scienter misdemeanor statute involved in that case to be unconstitutional. *State v. Warth*, 173 Ohio St. 15, 179 N. E. 2d 772. (See Appendices 6 and 11.) The film was not permitted to be shown in Virginia or in Maryland, where requests for deletions in the movie had not been complied with by the owners.

The November 1959 issue of "Films in Review" catalogues the movie in "the class of pornography for 'cultivated' degenerates" and calls its script "an unbelievable contrivance to lead up to one scene in which the camera records at length the facial reactions of a woman during cunnilingus." (See Appendix 20).

The obscenity of the film is discussed in the Ohio court opinions at Appendices 2, 3, and 4, written by judges who saw the motion picture as part of the evidence. Similarly, Chief Judge Campbell of the United States (Northern) District Court of Illinois, Eastern Division, pointed out the obscenity of "The Lovers" in *Zenith International Film Corp. v. City of Chicago, Ill.*, 183 F. Supp. 623, at pages 635-6. (See Appendix 13.)

SOME PRELIMINARY CONSIDERATIONS.

The federal questions presented are not substantial. *Zucht v. King*, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24. The nature of the case and of the rulings of the court is not such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain jurisdiction. *Mapp v. Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684; *Smith v. California*, 361 U. S. 147, 4 L. ed. 2d 205, 80 S. Ct. 215; *Alberts v. California*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304; *Burstyn v. Wilson*, 343 U. S. 495, 96 L. ed. 1098, 72 S. Ct. 777; and *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. ed. 888, 59 S. Ct. 618, 59 S. Ct. 647.

This honorable Court should decline jurisdiction. The questions presented do not require plenary consideration, with briefs on the merits and oral argument, for their resolution.

The judgment sought to be reviewed involves post-publication conviction for knowingly having obscenity in one's possession and under one's control and the knowingly exhibiting of such obscenity. Accordingly, the following cases can hardly be looked to as advocating the exercise of jurisdiction by this honorable Court: *Mapp v. Ohio, supra*, which was decided upon the grounds of an unconstitutional search and seizure, and which concerned the *mere* knowing possession or control of obscene material, while the instant case involves the knowing possession and control of obscenity *for the purpose of public exhibition; Smith v. California, supra*, predicated upon the possession of an obscene book *without knowledge of the contents* of such book; *Alberts v. California, supra*, wherein the primary constitutional question, *answered in the negative*, was whether the obscenity provisions of the California Penal Code invaded the freedoms of speech and press as they might be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment; *Burstyn v. Wilson, supra*, anent *prior restraint* upon publication upon a claim of *sacrilege*; and *Lanzetta v. New Jersey, supra* which struck down a vague and uncertain state statute seeking to define and punish a "gangster." The term "obscene", on the other hand, has withstood attacks of vagueness and uncertainty. *Roth v. United States*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304.

In discussing his claim of the substantiality of the questions raised at pages 6-8 of his jurisdictional statement, the Appellant refers to *Mapp v. Ohio, supra*, which

was decided on grounds other than the validity of Section 2905.34 of the Ohio Revised Code (See Appendix 5) as it pertained to the *mere* possession of obscenity. When that case was considered by the Ohio Supreme Court, a majority of that court was of the opinion that the statute was unconstitutional as it applied to a defendant who, in packing up the belongings of a former roomer in such defendant's home, found lewd and lascivious books and pictures and packed them with such former roomer's other belongings *for the purpose of storing them for the roomer (owner of the books and pictures) until he came for them.* However, since a majority of less than six members of the Ohio Supreme Court was of the opinion that the portion of the statute upon which the conviction was based was unconstitutional and void, the judgment of the Ohio Court of Appeals sustaining the conviction had to be affirmed under a provision of the Ohio Constitution. *State v. Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, 11 Ohio Ops 2d 169.

Judge Herbert of the Ohio Supreme Court, who believed that the obscenity statute had been unconstitutionally applied in the case of the convicted defendant, wrote *inter alia* in his dissenting opinion in the *Mapp* case:

> "* * * I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home had been lost by her own conduct * * *."

Judge Bell concurred in this opinion. We may well infer that even the most ardent opponents of the "mere possession" interpretation of the statute hold to the opinion that

possession for "a commercial purpose," for "the purpose of distribution, commercial or otherwise" would be properly prohibited by the statute. Such inference is supported by the Ohio Supreme Court's opinion in the instant case, set forth at Appendix 2:

> "The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.
>
> "It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to be the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole."

It certainly was obvious to the trial court at the commencement of the trial, when the constitutionality of Section 2905.34 was raised on the argument of a demurrer to the indictment, that the count of possessing and controlling the motion picture film related to the same film claimed to have been exhibited. The bill of particulars, which had been submitted to the defendant at his request in advance of trial, and which became part of the court's file, made it clear that the purpose of the claimed possession was a commercial one. (See Appendix 21.) Therefore, the trial court properly applied the Ohio Supreme Court holding in

State v. Mapp, supra which upheld the ban on the possession of obscenity. There is no showing that the trial court did not have in mind that the possession alleged was associated with the exhibition alleged.

The trial court and the Ohio highest court were not at odds in their interpretation of Section 2905.34. As is pointed out in *Cole v. Arkansas*, 338 U. S. 345, 94 L. ed. 155, 70 S. Ct. 172, it is speculative that such a discrepancy, if it existed, would constitute a basis for concluding that an unconstitutional situation existed. In *Winters v. New York*, 333 U. S. 507, 92 L. ed. 840, 68 S. Ct. 665, the statute in issue was unconstitutionally vague both before and after the State Court of Appeals had restricted the statutes. No impropriety was found in the fact that the statute had been restricted.

There can be no doubt that the Appellant in the instant case was completely, totally, and specifically aware of the contents of the film prior to his public exhibition of it. On November 12th, during the daytime, he informed a police officer that he (the Appellant) had seen it twice. The evening, he gave two public exhibitions. On November 13th, he gave one full exhibition and part of another. In view of these facts, it would be useless to discuss the extent of the knowledge of obscenity on the part of an accused, as suggested by the Appellant at page 7 of his jurisdictional statement, wherein he cites *Smith v. California, supra.*

Less than serious is the statement at page 8 of Appellant's jurisdictional statement: "Another question presented is whether this Court intended by its opinion in *Roth* (354 U. S. 485) to free serious artistic endeavor and accomplishment from censorship."

At page 7 of his jurisdictional statement he suggests a question not raised in his notice of appeal as to the geo-

graphical area of the "community," the standards of which should be applied. *Roth v. United States, supra.* He was indicted by a County Grand Jury, tried by a three-judge county court, waived trial before a jury drawn from the county, and called as his witnesses persons from the county who testified as to the community standards of the county.

QUESTION 1.

In the case at bar, Section 2905.34 of the Ohio Revised Code does not violate the Federal Constitutional guarantees of freedom of communication. It does not punish the mere private possession of obscene material without regard to the nature and purposes of the possession.

As is pointed out elsewhere, the instant case is clearly distinguishable from *State v. Mapp, supra*, reversed on grounds other than obscenity in *Mapp v. Ohio, supra*. *Mapp* concerned the *mere* knowing possession or control of obscenity; the instant *Jacobellis* case involves the knowing possession or control of obscenity *for the purpose of public exhibition*. Even *State v. Mapp, supra*, did not foreclose the ban on possession for the purpose of exhibition, as will be seen from the opinion of Judge Taft (170 Ohio St. 427), *supra*, at pages 429, 431, and 432):

> "Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings *with the purpose of storing them*

until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police."

* * *

"The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. ed. 2d, 2211. That annotation does not indicate that there is any case decided in a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even *where the possessor does not have a purpose of again looking at the books or pictures*; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her *evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner* * * *

"If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for her * * *" (Emphasis supplied.)

In *Alberts v. California, supra*, the constitutionality of a state statute and a conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them were sustained. *A fortiori*, the constitutionality

of an Ohio statute prohibiting the knowingly possessing and controlling and exhibiting of an obscene motion picture film and a conviction thereunder for knowingly possessing and controlling the obscenity *for the purpose of exhibition* and the actual exhibiting thereof are sustainable. The generic concept of *possession* includes within its ambit the species of possession *for the purpose of exhibition*. And that is the gist of the offense at bar. When the Ohio Legislature amended Section 13035, General Code (now Section 2905.34, Revised Code) in 1939, it assuredly did not intend to remove the prohibition against *possession for the purpose of exhibition*, a "purpose of distribution, commercial or otherwise," as was so aptly phrased by the dissenting Judge Herbert at page 438 of *State v. Mapp*, 170 Ohio St. 427, *supra*.

The prevailing and authoritative interpretation of Section 2905.34 with reference to the instant case is to be found in *State v. Jacobellis*, 173 Ohio St. 22, 179 N. E. 2d 777, and *State v. Wetzel*, 173 Ohio St. 16, 179 N. E. 2d 773. (See Appendices 2 and 12.) At the time that the trial court ruled upon the Appellant's demurrer, as mentioned at page 5 of his jurisdictional statement, the authoritative interpretation was *State v. Mapp, supra, which did not and does not militate against or contradict the interpretation in State v. Jacobellis*, 173 Ohio St. 22, *supra*, or *State v. Wetzel, supra*. Specifically in point with the facts of the case at bar are *Jacobellis* (173 Ohio St. 22) and *Wetzel* on the question of the possession of obscenity. *Mapp* was generally in point.

In *Mapp v. Ohio, supra*, there can be little doubt that neither Mr. Justice Stewart nor Mr. Justice Harlan was contemplating a case of *possession for the purpose of exhibition* when the former, at page 672, wrote with reference to the latter at page 686:

* * *

"I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

There was no attempt by the Ohio Supreme Court to re-define a statutory crime, after the defendant had been found guilty, in order to validate the conviction, as claimed by the Appellant at pages 10-11 of his jurisdictional statement, citing *Lanzetta v. New Jersey*, as his authority in point. In the first place, *State v. Mapp, supra*, did not exclude application of Section 2905.34 to a possession-for-exhibition case. And, secondly, *State v. Jacobellis*, 173 Ohio St. 22, *supra*, as well as *State v. Wetzel, supra*, validly applied the same Section to a possession-for-exhibition set of facts. Finally, *Lanzetta v. New Jersey, supra*, did not strike down a state statute *because* it had been defined by an appellate court, but because the statute was vague, indefinite, and uncertain *even after it had been so defined*. There can be no question of "retroactive effect" in the construction of the statute for, if at all, the statute, as interpreted by Ohio's highest court in the *Jacobellis* (173 Ohio St. 22) and *Wetzel* cases, is more restrictive than it was in *State v. Mapp, supra*. Since Section 2905.34, among its provisions, prohibits exhibition of an obscene motion picture film, the interpretation of the provision banning possession and control of an obscene motion picture film in such a way as to require that such possession or control be for the purpose of exhibition, for example, is not prejudicial to an accused. It requires the prosecution to prove purpose, and that beyond a reasonable doubt. Under *Herbert v. Louisiana*, 272 U. S. 312, 71 L. ed. 270,

47 S. Ct. 103, whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State. At pages 316-317, this honorable Court observed:

> "* * * The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation. * * * The Supreme Court of the State having held that the two statutes must be taken together in determining the penalty intended we must accept that conclusion as if written into the statutes themselves. * * * All that would be open in this Court under the due process clause is whether the State had power to impose the penalty fixed by the statutes as thus construed. * * * That the State had such power is not questioned, but only that the statutes rightly construed show that the power has been exercised. On this question, as we have said, the decision of the Supreme Court of the State is controlling."

The so-called "attempted change by the Ohio Supreme Court in the elements of the crime of which Appellant was convicted" (as claimed by the Appellant at page 11 of his jurisdictional statement) is no *change*, nor is it an *attempted change* in the elements prejudicial to the Appellant. After *State v. Mapp*, *supra*, and before *State v. Jacobellis*, 173 Ohio St. 22, *supra*, and *State v. Wetzel*, *supra*, he was less free than he was after the *Jaco-*

bellis, 173 Ohio St. 22, and *Wetzel* cases: his possession of obscenity *regardless of purpose* fell within the prohibitions of Section 2905.34. Now, purpose must be inquired into. The Appellant cannot successfully claim that the explication of *possession* and *control* in the *Jacobellis*, 173 Ohio St. 22, and *Wetzel* cases denied him either the opportunity to avoid offending the law or the opportunity to prepare his defense against the charge of violating it.

The Appellant's possession and control of the motion picture film was not a "mere private possession," but a possession and control highly-publicized by the Appellant himself. *State v. Mapp, supra.*

To make effective the prohibitions against the selling, lending, giving away, exhibiting, or publishing of obscenity, as provided for in Section 2905.34, the possession and control of obscenity for such purposes should be proscribed. Among the ultimate objectives of bringing obscene material into being are the selling, lending, giving away, exhibiting, and publishing. Since the possession and control of obscenity in the instant case were for the purpose of exhibition, the question as to whether or not the application of Section 2905.34 was a valid exercise of the police power should be determined in the light of the facts of the case, not on the basis on a non-existent "mere" possession. The statement of Professor Paul A. Fruend, quoted in another connection in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 1 L. ed. 2d 469, 77 S. Ct. 1325, is appropriate here: "What is needed is a pragmatic assessment of its operation in the particular circumstances."

Here, the defendant procured the film for exhibition. He held a private showing for the benefit of local newspaper motion picture critics. He inserted highly-suggestive advance advertisements in the daily newspapers. The police department, having been put on notice by such adver-

tisements, conferred with him about the propriety of the exhibition of the film. The defendant thereafter exhibited the film publicly twice that evening. The advertisements continued. The motion picture was being exhibited the following evening (for the second time that evening) when the defendant was arrested and the showing was stopped.

This case is clearly distinguishable from *State v. Mapp, supra.* The privacy of the defendant's home and of his own library is not an issue. He was not a mere custodian of the obscene material. The seizure was not unreasonable. Well in advance of his arrest the defendant had knowledge of the contents of the film, yet he persisted in the possession, arranged for advertisements, and proceeded to exhibit. No proximate or remote effect upon free speech or free press is involved.

In *Smith v. California, supra,* we may logically infer that, if the element of *scienter* had been required, the ordinance of the City of Los Angeles would have been upheld. It is interesting to note that, *inter alia,* that same ordinance made unlawful the possession of an obscene motion picture film *in any place where motion pictures are exhibited*—a regulation which aptly applies to the fact situation in the instant case.

QUESTION 2.

Section 2905.34 of the Ohio Revised Code, as interpreted and applied in this case, is not violative of the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene.

In *Rosen v. United States,* 161 U. S. 29, 40 L. ed. 606, 16 S. Ct. 434, it was well decided that an accused's alleged lack of knowledge of the fact of obscenity and his alleged

belief in the non-obscenity of the material in issue is unavailing, if the material was in fact obscene and the accused knew or had notice of the contents of the material. At page 41, the Court wrote, *inter alia*

* * *

> "* * * Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. * * *"

See also *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 S. Ct. 366, and *Roth v. United States*, *supra*, at page 491; 33 *Am. Jur.* 18, Sec. 6; Ann. Cas. 1912A 434; 67 *C. J. S.* 32, Sec. 7e; and *Notes on U. S. Reports* contained at pages 470-71, 40 L. ed.

The test for obscenity is not a subjective one wherein the accused decides the criminality or non-criminality of his own act.

The Appellant had good reason to know that the material was obscene. He did not have cogent reasons for believing that it was not obscene. He advertised it in the local daily papers in such terms as "conventions explode," "the most daring love story ever filmed," "very pure in its worship of sex itself as the incarnation of love," "unabashed, truthful sensuality," and characteristics of a "sexual revolution." (See Appendices 14, 15, 16, 17, and 18).

The instant case of a motion picture theater manager, specifically aware of the contents of the film, advertising in advance and then giving public exhibitions of "The

Lovers" is not to be identified with the proprietor of a bookstore concerned in *Smith v. California, supra.* At page 154, the Court's opinion contains the following language:

* * *

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; *whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.*" * * * (Emphasis supplied).

In the case at bar, we are dealing with one who is fully aware of the contents of the material in question, not a person surrounded by an immensity of ever-new publications constantly flowing through his place of business, any of which might be obscene. The latter could be honestly mistaken as to whether or not the contents of any specific book were obscene, having little or no knowledge of the contents themselves.

Distinguishable is *Lambert v. California*, 355 U. S. 225, 2 L. ed. 2d 228, 78 S. Ct. 240, which concerned a city ordinance making it an offense for a person convicted of a crime punishable in the state as a felony to remain in the city for more than five days without registering with the Chief of Police. As applied to a person who had no actual knowledge of his duty to register, and *where there was no showing made of the probability of such knowledge*, the ordinance was held to be invalid. Likewise distinguishable is *Sweezy v. New Hampshire*, 354 U. S. 234, 1 L. ed. 2d 1311, 77 S. Ct. 1203, involving a conviction of contempt of court of a person who refused to answer questions relat-

ing to the contents of a lecture he had delivered and his knowledge of the Progressive Party of the State and its members. Again, distinguishable is *Wieman v. Updegraff*, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215, relating to a state statute requiring each state officer and employee, as a condition of his employment, to take a "loyalty oath." As applied to persons excluded from state employment solely on the basis of membership in a "communist front" or "subversive" organization, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged, the statute was held to violate the Due Process Clause of the Fourteenth Amendment.

The administrative ruling of the Bureau of Customs that the film was "not obscene within the meaning of Section 305 of the Tariff Act" (mentioned at page 4 of Appellant's jurisdictional statement) was and is not binding upon Ohio. The people of a state, in the case of a foreign film such as the one in issue, are not compelled to rely solely upon the customs officials for their judgment. Such customs officials, in admitting a film, do not prevent the people of a state from arriving at a different judgment. *Eureka Productions, Inc., v. Lehman,* 17 F. Supp. 259, 309 U. S. 634, 82 L. ed. 494, 58 S. Ct. 944; *Arrow Distilleries v. Alexander*, 306 U. S. 615, 83 L. ed. 1023, 59 S. Ct. 489. The federal statute regulating the admission of films into the United States has as its purpose the supplementing of state legislation, leaving the matter of local control for determination by the states. *Eureka Productions, Inc., v. Lehman, supra.*

The claim that the Appellant knew that the film was shown publicly and was widely reviewed and was found acceptable in a number of cities in the United States before it was forwarded to Appellant is sheer extravagance

and not borne out by the facts. Since the Customs determination was not binding upon Ohio, the Appellant was not required "to make an independent judgment contrary to that reached by a government agency." (See page 13 of Appellant's jurisdictional statement). The claim that he was required to make an independent judgment contrary to "that apparently reached in other parts of the United States" is absolutely disingenuous.

The prosecution for the possession of obscenity for the purpose of exhibition, and the prosecution for the actual exhibition thereof, do not violate the First and Fourteenth Amendments. There is no tendency to suppress constitutionally protected expression. *Smith v. California, supra.*

QUESTION 3.

Despite the provisions of paragraph 1 (b) (ii) of Rule 13 of this honorable Court, the jurisdictional statement omits mention of the following pertinent facts:

1. Section 1 of Rule XX of the Rules of Practice of the Ohio Supreme Court authorizes the making of an application for rehearing of any cause within fourteen days after the announcement of a decision. (See Appendix 9).

2. On January 22, 1962, the Ohio Supreme Court was informed in writing by the then-attorney for the Appellant that he, the attorney, intended to apply for a rehearing of the decision of January 17, 1962, now sought to be reviewed, and, further, that the application for rehearing, together with supporting brief, would be submitted to that Ohio Court on or before January 31, 1962.

3. On January 30, 1962, the same attorney for the Appellant informed the Ohio Supreme Court in writing that he was thereby withdrawing his intention to apply for such a rehearing.

In light of the foregoing, it is apparent that the Ohio Supreme Court was given no opportunity to pass judgment upon Question 3, a ground on which the jurisdiction of this honorable Court is invoked.

Jurisdiction of this honorable Court is sought to be invoked by means of appeal under the provisions of Title 28 of the United States Code, Section 1257 (2), relative to a final judgment by the highest court of Ohio wherein was drawn into question the validity of an Ohio statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

At no time was there raised in either (1) the trial court, (2) the intermediate appellate court, or (3) the highest Ohio court, the claim that:

* * *

> "* * * the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court * * *" (See paragraph (c) (3) at page 3 of Appellant's jurisdictional statement).

In specific negation of the allegation at pages 5-6 of Appellant's jurisdictional statement, Question 3 was not raised at the conclusion of the trial, on argument to the trial court, nor was it argued on appeal to the Court of Appeals of Cuyahoga County, or by assignment of error on the appeal to the Ohio Supreme Court.

Nevertheless, as will be seen from a perusal of the unanimous memorandum opinion of the three-judge trial court (Appendix 4), the unanimous affirming opinion of the three-judge County Court of Appeals (Appendix 3) (*State v. Jacobellis*, 175 N. E. 2d 123), and the opinion of six of the seven judges of the Ohio Supreme Court (Appendix 2), each of these state courts judged the film on

the basis of those standards previously enunciated by this honorable Court, especially reflected in *Roth v. United States, supra,* together with *Alberts v. California, supra.* The dissenting jurist in the highest Ohio court in *State v. Jacobellis,* 173 Ohio St. 22, 179 N. E. 2d 777, wrote no opinion. He was in poor health at the time of oral argument before the Ohio Supreme Court and also when that court rendered its judgment of affirmance.

Nothing in the judgment or in the opinions of this honorable Court relative to *Manual Enterprises, Inc. v. Day,* ___U. S. ___, ___ L. ed. 2d ___, 82 S. Ct. 1432, militate against the obscenity of "The Lovers," a motion picture which is so offensive on its face as to affront current community standards of decency.

The trial court, in convicting the Appellant, judged the film in accordance with the standards set forth in *Alberts v. California, supra,* as will be see in Appendix 4:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* * * *. *'Les Amants'* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. * * *"

As pointed out elsewhere, *Roth* and *Alberts* were decided together.

The district court of appeals utilized the same standards, as appears in Appendix 3:

> "The trial court, in finding the defendant guilty as charged, was governed by the standards defined

and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, 'Les Amants' we agree with and adopt the same as part of our opinion in this case * * *"

(At this point, the higher court set forth *verbatim* the contents of Appendix 4 almost in its entirety.)

The highest Ohio court, too, with six of its seven judges concurring as to the obscenity of the film, also wrote *inter alia:*

"The definition which has now become classic was laid down in *Roth v. United States, supra,* as follows, at page 489 * * *

"Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. * * *

* * *

"* * * The facts were found by three judges sitting as triers of the facts who applied the standards prescribed in *United States v. Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

"This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. * * *"

Further evidence that the Ohio courts judged the film obscene in accordance with standards *in conformity* with those prescribed by this honorable Court is the fact that

the Appellant, in his brief filed in the Ohio Supreme Court, criticized *Roth v. United States, supra,* found fault with its definition of "obscenity" and the standards by which it should be judged, cited its rejection by some state courts, and claimed that *Roth* is not binding upon the Constitution of the State of Ohio. *The Appellant requested the Ohio Supreme Court to reject the test* announced in *Roth* for the reason that it was *unconstitutionally vague, impractical, and unworkable!* (See Appendix 10.)

Judge Radcliff, in writing the opinion of the Ohio Supreme Court in *State v. Jacobellis,* 173 Ohio St. 22, *supra,* (Appendix 2) set forth his personal position in the case:

> "At the outset it is well to recall that an opinion of this Court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case." * * *

Now, the only fair and reasonable interpretation of Judge Radcliff's language that "The Lovers" was not hard-core pornography (filth for filth's sake), that it was worse because it was filth for money's sake, is this: the film was hard-core pornography *and more.* The film, suppressed as obscene, fell squarely within the definition of that term outlined in *Roth* and as recently outlined in *Manual Enterprises, supra.* In this connection, the cases of *Burstyn v. Wilson, supra,* and *Smith v. California, supra,* are not violated.

No valid parallel may be drawn between the instant case and *One, Inc., v. Olesen,* 241 F. 2d 772, 355 U. S. 371,

2 L. ed. 2d 352, 78 S. Ct. 364; *Times Film Corp. v. City of Chicago*, 244 F. 2d 432; 355 U. S. 35, 2 L. ed. 72, 78 S. Ct. 115; and *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564; 249 F. 2d 114; 355 U. S. 372, 2 L. ed. 352, 78 S. Ct. 365. It is apparent from reading the opinion in *One*, as enunciated by the appellate court, that the now prevailing standard for judging obscenity was not followed. Firstly, the legal consideration of the fact situation at that time antedated by some months the *Roth* decision, and failed to anticipate its rationale. Secondly, it appears affirmatively that the said lower court did not have in mind the dominant theme of the material taken as a whole, its appeal or prurient interest to the average person, and the contemporary community standards. Hence, this honorable Court, when it considered *One* several months after the *Roth* case; was called upon to reverse.

The above analysis with reference to *One* applies with equal vigor to the *Times* case.

Although the *Sunshine* decision in the appellate court postdated by some months the *Roth* case, the then and now prevailing standard for judging obscenity was not applied by the appellate court. That court did not apply it in its own appraisal of the allegedly obscene material. And it also erred in finding that the lower district court had followed the spirit of the *Roth* decision. Once again, this honorable Court was obligated to reverse.

As both the intermediate appellate court and the trial court in the instant case set forth at Appendices 3 (175 N. E. 2d 123) and 4:

* * *

> "In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the state has been set and the characters have assumed their relation-

ships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. *After the narrative has reached this carefully built-up and long-anticipated climax, it scurries to a hasty conclusion.*

"*In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.*" (Emphasis supplied.)

* * *

In view of Judge Radcliffe's opinion setting forth that "Les Amants (The Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake," that "(i)t was worse," and that "(i)t was filth for money's sake," it can be seen that there is no basic conflict between the above-quoted language of the intermediate appellate and trial courts and that of the Ohio Supreme Court, speaking through Judge Radcliff. The motion picture was not judged by the effect of an isolated portion. It was considered as a whole. No analogy may be drawn between "The Lovers" in the instant case and "Lady Chatterley's Lover," as considered in *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433.

As pointed out elsewhere, the Appellant, at his trial, presented evidence as to the community standards of Cuyahoga County in order to support his claim that the motion picture was not obscene under the *Roth* test. Now, he

complains that the trial court judged the movie by those standards. *Webster's New International Dictionary*, second edition, unabridged, defines the term *community* as:

> "1. A body of people having common organization or interests, or living in the same place under the same laws and regulations. * * *
>
> "2. Society at large; a commonwealth or state; a body politic; the public, or people in general;— used with the definite article; as, the interests of the *community*; restrictedly, the people of a particular place or region, as a town, village, or neighborhood; hence, the region itself; as, the proposed system will benefit our *community*. * * *" (Emphasis supplied.)

The court below did not fail to consider the so-called "artistic merit of the film." The court viewed the film itself. And it had before it the testimony of a film critic with forty-one years experience as a writer for the *Cleveland Plain Dealer*; a former television program chairman, currently an editorial writer and Cleveland radio broadcaster; and the editor of "Films in Review," published in New York, a monthly magazine devoted to every serious aspect of motion pictures, published by a national review board, which editor had reviewed 200 or 300 movies a year for the previous ten years. The Appellant's "experts," on the other hand, were unable to rebut the evidence that the movie was a piece of obscenity, not a work of art. The claim at page 16 of Appellant's jurisdictional statement that "(t)he excellence of the direction, acting and photography, have been generally acknowledged by those qualified to make such judgments" is without proof and is contrary to fact.

QUESTION 4.

Appellant was not convicted and punished twice under Section 2905.34 for the same offense.

It should be pointed out that the first count of the indictment charged that the Appellant:

> "* * * *on or about* the 13th day of November, 1959, at the County aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious Motion Picture Film, to-wit: (Les Amants) 'The Lovers' * * *"

The Appellant exhibited the film twice in the evening of November 12, 1959, and during the second showing in the evening of November 13th, was halted by the police. He had been in possession of the film for the purpose of exhibition from and during the daytime hours of November 10th until during the evening hours of November 13th. Only a small fraction of that entire period was devoted to the actual exhibition. Accordingly, the trial court, in passing upon the charge of possessing and controlling obscenity, did not necessarily find that (1) the exhibition of obscenity, for which the Appellant was convicted, was simultaneous with (2) the possession and control of obscenity, for which the Appellant was convicted.

During the many hours of the period November 10th-13th, possession and control (rather than exhibition) characterized the overwhelming majority of the time. Again, with specific reference to the date of November 13th, there were many hours of possession and control distinct from those hours during which the film was exhibited.

Likewise, the Appellant possessed and controlled the film on November 10th and 11th, on which specific dates he did not exhibit the movie. Certainly, those periods of

possession and control were not the same offenses as the exhibitions of November 12th and 13th.

One can be guilty of felonious possession of a film for the purpose of exhibition without actually exhibiting it.

Section 2905.34 provides a maximum punishment of a money fine *and also* imprisonment for each act of possession of obscenity and each act of exhibition of obscene material. On conviction of the *possession* charge, the Appellant was fined only. The same was true of the penalty imposed with reference to his conviction for exhibition. In neither case was he sentenced to imprisonment. So, on neither count nor on both counts did he receive the maximum penalty of both a money fine and imprisonment. Inappropriately cited by the Appellant is *Ex parte Lange*, 85 U. S. 163, 21 L. ed. 872, relating to a case in which a court imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment. Nor in point is *In re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 S. Ct. 672, involving the conviction of the crime of unlawful cohabitation as being a bar to a subsequent prosecution for the crime of adultery.

QUESTION 5.

Under the provisions of paragraph 2(c) of Rule 10 this honorable Court may not consider Question 5. It was not raised in the notice of appeal, contrary to the provisions of paragraph 1 (e) (2) of Rule 15. While a seemingly similar issue was raised in the notice of appeal, Question 5 is in addition thereto, is different in substance, and is not fairly comprised therein.

Despite the foregoing, and out of an abundance of caution, there follows a discussion of Question 5 to show that Section 2905.34, in light of related statutes, does not

deny equal protection of the laws, nor does it authorize punishment without due process of law.

No proper analogy may be drawn between the instant case and *Jones v. Opelika*, 319 U. S. 103, 87 L. ed. 1290, 63 S. Ct. 890, which involved a city ordinance requiring that license be procured and that taxes be paid by missionary-peddlers of religious books or tracts as a condition precedent to the pursuit of their activities. Such legislation was held to be a denial of freedom of speech, press and religion under the Federal Constitution.

The Appellant's citing of *City of Cincinnati v. King*, 11 Ohio Ops. 2d 433, 84 Ohio Abstract 84, 168 N. E. 2d 633, is apparently intended to draw attention to a finding of a municipal trial court judge to the effect that the state statute Section 2905.34 was unconstitutional, thus sustaining the local ordinance against the charge that it made a misdemeanor of the same acts proscribed by the state felony statute. Suffice it to say that no higher court has looked to this opinion as a valid precedent.

A reasonable interpretation of Ohio Revised Code Sections 2905.37 and 3767.01 (c), set forth at Appendices 7 and 8, reveals that Ohio Revised Code Section 2905.34, set forth at Appendix 5, of which the Appellant was convicted of violating, applies uniformly to all persons knowingly possessing, controlling, or exhibiting obscenity.

The provisions of Section 2905.37 relative to a "work of art" were a safeguard in arriving at a proper understanding, prior to *Roth v. United States, supra*, of what was meant by the expression "obscene, lewd, or lascivious * * * motion picture film * * *" prohibited by Section 2905.34. No association of artists or for the advancement of art is given license to exhibit or possess or have under its control an obscene motion picture film. No such association is exempted from the operation of Section

2905.34. An obscene motion picture film is not a "bona fide" work of art.

Section 2905.34 of the Revised Code was last amended by the General Assembly in 1955, almost two years prior to the enunciation of the standards for judging obscenity appearing in *Roth v. United States, supra.* Confusion had reigned over a long period of time as to what constituted obscenity and wherein it could be distinguished from a true work of art. Oftentimes, works of art portraying nudity and sex were erroneously identified with obscenity. *Roth* solved the then-existing problem by its definition and description of obscenity and its setting of the standards by which obscenity might be judged. However, before *Roth*, the Ohio General Assembly felt called upon to make some necessary differentiation between obscenity and works of art. Section 13037 of the General Code (predecessor to Section 2905.37 of the Revised Code) was amended accordingly in 1943; it was specifically spelled out that obscenity was not included in "Bona fide works of art."

Section 2905.37 of the Revised Code makes reference to a "bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44 inclusive, of the Revised Code * * *." It follows, therefore, from the provisions of that series of statutes just mentioned, that such bona fide association is one whose proven aims are in conformity with a well-ordered society wherein the following crimes (and conduct leading to such crimes) are suppressed: Obscene language, nudism, obscene literature, obscene motion picture films, obscene matter, immoral literature, immoral pictures, immoral exhibitions, lewd pictures, bigamy, sodomy, adultery, fornication, incest, seduction, prostitution, pandering, procuring, white

slavery, and indecent exposure. In addition, such "bona fide association", must not have sympathy with sexual items or matters which are illicit, lewd, obscene, indecent, immoral, disorderly, indiscriminate, unchaste, licentious, filthy, impure, lustful, corrupt, profane, and improper.

In view of the foregoing, how can it be truthfully said that an association of artists or an association for the advancement of art is exempt from the penalties of Revised Code Section 2905.34? How does it appear that the legislature approves traffic in obscenity by artists?

It might be noted in passing that Section 2905.37 of the Revised Code bears out the proposition that works of art are legitimate, and that legitimate works of art are not obscene.

The statute provides that "Sections 2905.33 to 2905.36, inclusive, of the Revised Code *do not affect* * * * the publication and distribution of bona fide works of art *.* *." The terms of the statute are well chosen: An obscene motion picture film, not being a work of art, does not affect the publication and distribution of bona fide works of art.

A workable and adequate standard has been established by a statute within definite valid limits and with limitations for guidance. A policy has been laid down. No lack of uniformity or discrimination results. 11 *Am. Jur.* 955-56, Sec. 240. Section 2905.37 of the Revised Code provides that the works of art be bona fide; that they be made, published, and distributed by a bona fide association of artists or an association for the advancement of art; that such association be a non-profit organization; and that the demonstrated purpose of such organization does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, *suppressing the evils (and the means tending to result in such evils) enumerated in the fourth paragraph*

above, and inimical to the type of sexual items and matters set forth in the same paragraph.

Even had the movie "The Lovers" been made, published and distributed by an art association, the subsequent exhibition of the film by the Appellant would still be criminal because of the movie's obscenity. A *bona fide* work of art is not an obscene motion picture film. Nor is an obscene motion picture film a *bona fide* work of art.

The provisions of section 3767.01 relative to publications entered as second class matter by the post-office department are not discriminatory or unreasonable. They bear direct relation to the purpose of Section 2905.34.

Mailable matter is divided into four classes. Second class matter consists of all newspapers and other periodical publications. Further requirements for admission to second class are that such newspapers and other periodical publications must be issued at stated intervals, as frequently as four times a year; they must bear a date of issue and be numbered consecutively; they must be formed of printed sheets; and they must have a legitimate list of subscribers (39 U. S. C. Secs. 221, 224, 226). Accordingly, the provisions of Section 3767.01 of the Revised Code pertaining to "any newspaper, magazine, or other publication entered as second class matter by the post-office department" do not apply to the motion picture film "The Lovers." Neither the Appellant in the instant case nor any other motion picture possessor, controller, or exhibitor is affected in any respect. Where is the claimed power of the Post Office Department to exempt any possessor, controller, or exhibitor of an obscene movie from Ohio the penalties of Section 2905.34 of the Revised Code?

Irrespective of the fact that a motion picture film may not be admitted to the second class, the "post-office de-

partment" provision of Section 3767.01 of the Revised Code is a reasonable and constitutional narrowing of the application of Section 2905.34 of the Revised Code.

> "The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. * * *
>
> "The existence of the power of classification to suppress an evil is not to be denied simply because some innocent articles or transactions may be found within the prescribed class." (12 *Am. Jur.* 162-3, Sec. 484.)

It can validly be opined that the General Assembly of Ohio, in amending Section 6212-1 of the General Code (antecedent to Section 3767.01 of the Revised Code) in the year 1943 felt that there was a sufficient control of obscenity on a federal level as far as second class mail was concerned and that Ohio had little or no problem in that area. If such feeling on the part of the Legislature existed, then the separate classification of such publications is reasonable and valid. Obscenity is not mailable in *any* class. Its mailing is subject to a heavy fine and lengthy imprisonment (18 U. S. C. Sec. 1461). And the second-class mail privileges may be suspended or annulled after a publication has been accorded them (39 U. S. C. Sec. 232). The grant of second class mail privileges to a newspaper or other periodical publication is no guarantee that issues of that newspaper or publication subsequent to the grant are not obscene. Hence the Federal provisions relative to the criminal prosecution of obscenity and the suspending or annulling of the grant.

A State may withhold provision for the punishment of a person subject to the Federal Obscenity Laws. The Ohio constitutional provision as to uniformity of operation does not preclude reasonable classification (*State ex rel. v. Thrasher*, 130 Ohio St. 434, 200 N. E. 468, 5 Ohio Ops. 55).

Because the General Assembly saw fit to rely upon the enforcement of the federal law regarding obscenity and the activities of the post office department relative to second class mail, it cannot be construed that Ohio was protecting obscenity in that field. The post office department has regulations making nonmailable obscene matter at any time; the second class mail privilege could be revoked if it found that succeeding issues of a publication were obscene, although the original issue or issues (upon which the privilege had been granted) were not obscene; persons who violated the regulations by mailing obscene material could be reported to the federal authorities for criminal prosecution on a federal level.

The Federal Constitution does not require that state laws shall cover the entire field of proper legislation in a single enactment. There is no constitutional requirement that regulation must reach every class to which it might be applied. It is not unconstitutional merely because it is not all-embracing, and does not include all the evils within its reach. The state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. The legislature is not bound to extend a police regulation to all cases which it might possibly reach. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. The state may legislate in such a manner even though the forbidden act does not differ in kind from those that are allowed, because it is free to recognize degrees of harm and

may confine its restrictions to those classes of cases where the need is deemed to be clearest. Hence, it is not enough to invalidate a law that others may do a thing which is equally harmful and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. 12 *Am. Jur.* 160-163, Sec. 484.

Finally, the attack upon the constitutionality of Section 2905.34, in light of the provisions of Sections 3767.01 (c) and 2905.37, was thoroughly aired in the trial court, the district court of appeals, and the highest court of the state. The statute withstood the charges of arbitrariness, unreasonableness, and discrimination.

QUESTION 6.

This Honorable Court, aware of an outline of the evidence presented in the trial court, and cognizant of the Ohio court opinions at Appendices 2, 3, and 4, the Federal court opinion at Appendix 13, the local movie critic's opinion at Appendix 19, and a national movie critic's opinion at Appendix 20, has an insight into the contents of the film in issue.

Patent offensiveness, as well as prurient interest appeal, characterizes "The Lovers." The reaffirmance of *Roth v. United States, supra*, in the recently-decided case of *Manual Enterprises Inc. v. Day, supra*, as well as the standards enunciated in *Manual*, make it unnecessary for this Honorable Court to reconsider its previous rulings.

Nor does *Smith v. California, supra*, imply that a review would be in order.

CONCLUSION.

For the reasons set forth in this brief, supporting the grounds stated in the motion, it is again requested that Appellant's appeal be dismissed, or, in the alternative, that the order appealed from be affirmed.

July 27, 1962

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney
of Cuyahoga County, Ohio.

Of Counsel:
THOMAS L. OSBORNE,
Assistant Prosecuting Attorney.

APPENDIX 1.

ORDER OF THE SUPREME COURT OF OHIO APPEALED FROM.

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is Ordered that no penalty be assessed herein.

It is further Ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX 2.

MAJORITY OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, WITH OPINION PARTIALLY CONCURRING AND PARTIALLY DISSENTING.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

> "* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:
>
> "(Les Amants) 'The Lovers'
>
> "Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the

records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* * * * exhibit * * * or have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film * * *.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State v. Wetzel*, decided December 10, 1960.

RADCLIFF, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible

to legislate morality for the people." In support of this, there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure or mode of selection, consequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

> "No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession

or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct. 1304.

In *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct. 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth v. United States*, *supra*, as follows, at page 489:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather

what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth v. United States, supra*, at pages 491 and 492:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States v. Petrillo*, 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.' "

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State v. Wetzel*, 173 Ohio St.,

16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examining and determining for himself the obscenity of all matters which pass through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment. *Roth v. United States*, *supra*, and *State v. Wetzel*, *supra*.

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and control for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of error raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States v. Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case (*State v. Jacobellis*) and the case of *State v. Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code. Warth was indicted, tried and convicted for violation of Section 2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this court in *City of Cincinnati v. Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith v. California*, *supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible question of inconsistency. Had

Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgment affirmed.

ZIMMERMAN, acting C. J., MATTHIAS, BELL and O'NEILL, JJ., concur.

HERBERT, J., dissents.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State v. Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of

the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

> "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words of the majority opinion, "for the purpose of circulation or exhibition." But compare *State v. Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to 1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

> "Whoever sells, lends, gives away [*i. e.*, circulates], exhibits * * * or has in his *possession for such purpose*, an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

APPENDIX 3.

OPINION OF THREE-JUDGE DISTRICT APPELLATE COURT (175 N. E. 2d 123).

PER CURIAM:

This is an appeal on questions of law from a judgment arising from a decision rendered by the Court of Common Pleas of Cuyahoga County (Criminal Division) finding the defendant guilty as charged on two counts of an indictment as follows:

> "(1) Unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers), and:
>
> "(2) Unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers.)"

The defendant elected to be tried before a court of three judges pursuant to Section 2945.07, Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, pursuant to the provisions of Section 2945.05, Revised Code. The trial was commenced on May 23, 1960 and concluded on June 3, 1960.

Section 2905.34, Revised Code, under which the defendant was convicted, insofar as pertinent, reads as follows:

> "No person shall knowingly sell, lend, give away, exhibit or offer to sell, lend, give away or *exhibit*, or publish, *or have in his possession or under his control*, an obscene, lewd or lascivious book, pamphlet, paper, magazine, writing, advertisement, circular, print, picture, photograph, *motion picture film* * * *."

The defendant-appellant complains of many assignments of error, one of which is that he was erroneously charged and found guilty of two separate crimes under Section 2905.34, Revised Code, in that the first count

charged the defendant with knowingly having possession and control of a certain obscene, lewd and lascivious motion picture film, to-wit: "Les Amants," and the second count with unlawfully and knowingly exhibiting this same motion picture film. This assignment of error cannot be sustained.

This precise question was before the Montgomery County Court of Appeals, where defendant was found guilty by a jury on two charges, namely, (1) possessing and (2) exhibiting an obscene motion picture film "The Lovers," see opinion by Kerns, J., in *State vs. Warth*, (No. 2576) decided July 7, 1960. Appeal as of right to the Supreme Court dismissed *sua sponte* for reason no debatable constitutional question involved. *State vs. Warth*, 172 Ohio St. 246, decided May 3, 1961. While the conviction in the *Warth* case was for violation of Section 2905.342, Revised Code, nevertheless, the legal principles involved are identical as applied to the facts of the instant case.

Also, this same question was before this Court where one, Gevaras, was convicted in the Court of Common Pleas of this County on two counts of one indictment, 1) of knowingly possessing and the other of knowingly exhibiting the same "obscene, lewd, or obscene motion picture film" under the provisions of Section 2905.34, Revised Code. On appeal on questions of law, this Court affirmed the judgment of the Court of Common Pleas. Thereafter, the Supreme Court of Ohio dismissed the appeal as of right for the reason that "no debatable constitutional question" was involved. *State of Ohio, Appellee, v. Gevaras, Appellant*, 170 Ohio St. 404, 165 N. E. 2d 652 (February 3, 1960).

The remaining assignments of error are grounded principally upon the claim of the defendant that the provisions of the statute, namely, Section 2905.34, Revised

Code, are violative of the constitutional rights of the defendant and are, therefore, null and void.

The defendant contends that the moving picture film in this case is not obscene and that it is within the area of constitutionally protected freedom of speech or press.

This contention of the defendant cannot be sustained. As to the question of obscenity, the three judge trial court, after a lengthy trial, based upon the testimony of numerous witnesses, the viewing of the film and all the evidence, found the moving picture film in question to be obscene, lewd and lascivious within the definition, description and test set forth in *Roth v. United States*, 354 U. S. 476.

In negating the claim that obscenity is within the area of constitutionally protected freedom of speech or press, the Supreme Court of the United States in paragraph three of the syllabus of *Roth v. United States*, 354 U. S. 476, which was considered and decided June 24, 1957, together with the case of *David S. Alberts v. California*, on appeal from the Superior Court of California, Los Angeles County, held, inter alia, as follows:

> "Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States."

And, in syllabus four (c) of the *Roth* case, *supra*, it is stated:

> "The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

Further, the court held in paragraph six of the syllabus, at page 477:

"When applied according to the proper standard for judging obscenity, para. 311 of West's California Penal Code Ann., 1955, which, inter alia, makes it a misdemeanor to keep for sale or to advertise material that is 'obscene or indecent,' does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendment against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt."

The court, at page 487 of the Roth case, declared:

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *"

The trial court, in finding the defendant guilty as charged, was governed by the standards defined and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, "Les Amants" we agree with and adopt the same as part of our opinion in this case, as follows:

"In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After

the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

"In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

"It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

"Therefore, the Court finds the defendant guilty as charged in both counts of the indictment."

As to each count of the indictment, the three judge court imposed a fine only.

Considering the record as a whole, including a viewing of the film by this Court, the film being an exhibit in the case, we conclude that the judgment of guilty by the three judge court is amply sustained by the evidence and that no error intervened prejudicial to the rights of the defendant.

The judgment must be and, therefore, is affirmed.

KOVACHY, P.J., SKEEL, J., HURD, J. concur.

APPENDIX 4.

MEMORANDUM OPINION OF THREE-JUDGE TRIAL COURT.

Before William J. McDermott, P.J., Roy F. McMahon, J., and John Pincura, J., (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

PER CURIAM

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers).

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture *"Les Amants"* (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and

indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 US 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. "*Les Amants*" (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

WILLIAM J. MCDERMOTT,
Presiding Judge.

ROY F. MCMAHON,
Associate Judge.

JOHN PINCURA,
Associate Judge.

APPENDIX 5.

STATUTE INVOLVED.

Ohio Revised Code Section 2905.34. *"Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, paper magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or

imprisoned not less than one nor more than seven years, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 8.)

APPENDIX 6.

RELATED STATUTE.

Ohio Revised Code Section 2905.342. "*Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited*:

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 9.)

APPENDIX 7.

RELATED STATUTE.

Ohio Revised Code Section 2905.37. "*Legitimate publications not obscene*:

"Sections 2905.33 to 2905.36 inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-34.)

APPENDIX 8.

RELATED STATUTE.

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions*:

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37 and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37. 39, at p. 201.)

APPENDIX 9.

RULE XX OF THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

RULE XX.

Rehearings—Issuance of Mandates.

Section 1. No motion can be made or heard for a rehearing. Application for rehearing of any cause or motion shall be made within fourteen days after the announcement of the decision. Such application may be either printed or typewritten, and nine copies thereof filed with the Clerk, and shall be confined strictly to reasons for a rehearing. No reargument of the cause on such application will be considered.

Section 2. When typewritten applications are filed the same shall meet the requirements of Section 11(a) of Rule II.

Section 3. Repealed January 18, 1955.

Section 4. One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court; and one week after announcement of decision of a motion to certify the record or for leave to file an appeal, if such motions be overruled, the Clerk shall issue a certified copy of the entry of this Court to the lower Court; provided, that if the Clerk be notified, within one week after announcement of a decision on the motion or general docket that application for a rehearing will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued. If an application be granted the former entry of this Court shall be thereby vacated and no Mandate or certified copy of entry shall issue until such rehearing has been had and the case or motion has again been decided.

APPENDIX 10.

EXCERPT FROM APPELLANT'S BRIEF IN THE SUPREME COURT OF OHIO.

* * * * *

In 1957, the Supreme Court of the United States attempted to redefine "obscenity" in *Roth v. United States*, 354 U. S. 476. In this most recent definition of "obscenity," the court stated the test to be:

> "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Id.* at 489.

This definition in the *Roth* case has already been rejected by the Supreme Court of Pennsylvania in *Commonwealth v. Blumenstein*, 396 Pa. 417 (1959). See also *William Goldman Theatres, Inc. v. Dana*, No. 530 Commonwealth Docket, 1959 No. 2385, C. P. Pa., July 30, 1960, and *Twentieth Century-Fox Film Corporation v. Boehm*, No. 538 Commonwealth Docket, 1959, No. 2387, C. P. Pa., July 30, 1960, in which the court followed the holding in the *Blumenstein* case, in finding that the term "obscene" was unconstitutionally vague.

The definiteness and workability of the definition in the *Roth* case is well worth the consideration of this court:

(a) *Prurient interest*—The term "prurient interest," as contained in the *Roth* case definition, added nothing new to the already existing definition of obscenity. *Webster's International Dictionary* (2d ed. 1959) defines prurient to include the more familiar terms of "lascivious" and "lewd." Thus, prurient interest provides no more objective definition than does the word "obscene" itself. For example, the charge of the trial court in the *Roth* case was, as follows:

"It must tend to stir sexual impulses and lead to sexually impure thoughts." (Record, p. 25, *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1956).)

Apparently the United States Supreme Court, in affirming, approved a charge which defines "obscene" in terms of itself. *Webster's International Dictionary* (2d ed. 1959) states one of the definitions of the word "impure" to be "obscene." It is abundantly clear that although some may argue that "everybody knows what obscene means," no one can define it except in terms of itself. Appellant contends that the attempt of the prosecuting attorney to base a criminal conviction on terms as vague as those embodied in Section 2905.34, is not compatible with due process of law.

(b) *Dominant theme*—It is not every publication which "appeals to prurient interests" that is obscene. Rather, it is only those publications the dominant theme of which has this appeal. See *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S. D. N. Y. 1959). The subjective definition of "obscene" coupled with the determination of what is the "dominant theme" of a publication, a judgment which is also necessarily subjective, has played havoc with the orderly administration of justice. In fact, the determinations by lower courts in this area have become nothing more than a guessing game. For instance, see *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), *reversing* 249 F. 2d 114 (D. C. Cir. 1957); *One, Inc. v. Oleson*, 355 U. S. 371 (1958), *reversing* 241 F. 2d 772 (9th Cir. 1957); *Times Film Corp. v. Chicago*, 355 U. S. 35 (1957), *reversing* 244 F. 2d 432, (7th Cir. 1957). In each of these cases the lower court had made its carefully considered determination that the material there involved was in fact obscene. However, the United States Supreme Court

reversed each of these decisions in a per curiam opinion, citing the *Roth* case. This record of lower court reversals is certainly not evidence that the definition in the *Roth* case provides to this appellant or to the courts, or for that matter, to any individual an ascertainable standard of conduct.

(c) *Contemporary community standards*—As yet, it appears that no court has determined what community's standards were to apply under the definition in the *Roth* case. Is it a nationwide standard, a statewide standard, or a local standard? And if it is the latter, is it the community in which the literature is published, the community in which it is read, or the community in which the literature is sold? Certainly, there is no national standard with respect to obscene literature in the United States. We are a country composed of fifty states with widely varying mores. This is abundantly clear as will be revealed by an examination of the various statutes of the states dealing with liquor, gambling, fornication and adultery. Once more, it is impossible to contend that the State of Ohio is a community in the sense that it has one moral standard. Literature which might be considered shocking in Ohio's rural areas may well be considered commonplace in Ohio's large industrial centers. There is grave doubt that even the residents of Cuyahoga County, or, in fact, the residents of the City of Cleveland, share a common standard. How is the standard of any community to be determined? Is it that which is distasteful to the average member of the community? Can such a determination be made by plebiscite? Can the First and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Constitution of Ohio be interpreted to allow the literary tastes of the average to govern that which the minority may read? Appellant submits that they cannot. In fact,

the "contemporary standard of the community" is no standard at all.

Although it may be argued that the test in the *Roth* case is determinative, at least for the moment, of the constitutionality of a statute proscribing the dissemination of "obscene" material insofar as the United States Constitution is concerned, the *Roth* decision is not binding in any manner as to the application to such a statute of Article I, Section 16 of the Constitution of the State of Ohio. The First Amendment to the Federal Constitution provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

Article I, Section 11 of the Constitution of Ohio contains the following:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press * * *."

It thus appears that the guarantee of freedom of speech contained in the Ohio Constitution is even stronger than its counterpart in the Federal Constitution as contained in the First Amendment. It was on the basis of a similar comparison that the Courts of the Commonwealth of Pennsylvania have rejected the test set forth in the *Roth* case for the reason that it is too vague. *Commonwealth v. Blumenstein, supra; William Goldman Theatres, Inc. v. Dana, supra; Twentieth-Century-Fox Film Corp. v. Boehm, supra.*

Further, the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 573 (1961), a decision rendered on May 25, 1961, held that it was not bound by the test in the *Roth* case as applied to its Penal

Law. Rather, because of the vagueness of the *Roth* definition, that court held that the New York Penal Law should be applied only to "hard-core pornography."

Appellant requests this Court to reject, as did the Supreme Court of the Commonwealth of Pennsylvania and the Court of Appeals of New York, the test announced in *Roth v. United States*, for the reason that it is unconstitutionally vague, and for the further reason that it is impractical and unworkable.

* * * * *

APPENDIX 11.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WARTH, (173 Ohio St. 15, 179 N. E. 2d 772).

(No. 36964—Decided January 17, 1962.)

APPEAL from the Court of Appeals for Montgomery County.

The defendant, as manager of a theatre in the city of Dayton, gave a public showing of a film titled "The Lovers." Because of such showing of the film, an affidavit was filed in the Dayton Municipal Court charging that defendant did "unlawfully exhibit, or have in his possession, or under his immediate control an obscene motion picture film contrary to Section 2905.342 of the Ohio Revised Code and against the peace and dignity of the state of Ohio."

Section 2905.342, Revised Code, reads in part:

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"* * *

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

Defendant entered a plea of not guilty and was tried to a jury in the Dayton Municipal Court, found guilty as charged in the affidavit, sentenced to imprisonment in the workhouse of the city of Dayton and ordered to pay a fine and costs of the prosecution.

The Court of Appeals, on appeal from the Municipal Court, affirmed the judgment.

The allowance of a motion to certify the record brings the cause to this court for review.

Mr. Arthur O. Fisher, city prosecutor, *Mr. Henry W. Phillips* and *Mr. Edward J. Duffy, Jr.*, for appellee.

Messrs. Wright, Harlor, Morris, Arnold & Glander, for appellant.

Per Curiam. Section 2905.342, Revised Code, making it a misdemeanor to have in one's possession an obscene motion picture film, without reference to knowledge or scienter on the part of an accused, is unconstitutional. *City of Cincinnati v. Marshall*, 172 Ohio St., 280; *Smith v. California*, 361 U. S., 147.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

ZIMMERMAN, acting C. J. RADCLIFF, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

APPENDIX 12.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WETZEL, (173 Ohio St. 16, 179 N. E. 2d 773).

(No. 36945—Decided January 17, 1962.)

CERTIFIED by the Court of Appeals for Wyandot County.

Edward J. Wetzel, the appellee herein, was indicted by the Grand Jury of Wyandot County in the following language:

> "The jurors of the Grand Jury * * * do find and present that Edward J. Wetzel * * * on the 8th day of February * * * 1960, at the county of Wyandot aforesaid, did unlawfully and knowingly have in his possession and under his control, obscene, lewd and lascivious picture photographs, pamphlets and other articles all of an indecent and immoral nature and all of which are too obscene for further description within the limits of decency and contrary to Section 2905.34 of the Revised Code of Ohio, and against the peace and dignity of the state of Ohio."

He pleaded not guilty and was tried before the Court of Common Pleas. A verdict of guilty was returned by the jury, and the defendant was sentenced to imprisonment in the Ohio Penitentiary.

An appeal on questions of law to the Court of Appeals resulted in a reversal of the judgment below and an order directing the discharge of the defendant. Such reversal was based on the determination that the part of Section 2905.34, Revised Code, under which the defendant was indicted and tried, is unconstitutional and void, being in violation of "Article I, Section 11 of the Constitution of Ohio and the provisions of the First Amendment to the Constitution of the United States."

The judges of the Court of Appeals, finding the judgment rendered to be in conflict with the judgment of the Court of Appeals for Cuyahoga County in the case of *State v. Mapp* (March 31, 1959), certified the record to this Court for review and determination.

Mr. Forrest H. Bacon, prosecuting attorney, for appellant.

Mr. Francis M. Marley, for appellee.

ZIMMERMAN, acting C. J. Section 2905.34, Revised Code, in its pertinent parts reads as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print [or] picture * * *.
>
> "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

On the trial, evidence presented by the state showed that on February 8, 1960, pursuant to a telephone call, the sheriff of Wyandot County went to a farm owned by the defendant's mother-in-law and located on a county road in Wyandot County some two and one-half to three miles west of the city of Carey. There, in a small barn on the premises, the sheriff found a chained and padlocked automobile trailer belonging to the defendant and admittedly placed there by him. The sheriff cut the chains, opened the trailer and discovered over 19,000 packaged duplicate items wrapped in brown paper sacks and consisting of illustrated pamphlets, photographs and reproductions of photographs and pen-and-ink drawings accompanied by reading matter, most of which material was of the lewdest and most lascivious character—an assorted collection of filth, shocking and repugnant to the average normal in-

dividual of any locality; in short, pornography at its very worst.

On the following day, the defendant was apprehended and charged with the crime defined in Section 2905.34, Revised Code. There were found in his possession keys which fitted the padlocks fastening the chains on the trailer.

Witnesses who lived nearby testified that to their knowledge defendant visited the part of the barn in which the trailer was housed some seven or ten times between November of 1958, when the trailer was placed in the barn, and February of 1960 and remained for periods of from ten to fifteen minutes to an hour. On one occasion, one of the witnesses observed the defendant carrying from the barn a brown colored package resembling and about the size of a shoe box. The defendant told the witness that, upon request, he occasionally sold material contained in the trailer.

In his own defense, defendant testified that he had not placed the chains and padlocks on the trailer and was unaware of the trailer's contents. He said that he had leased the trailer to another, with the privilege of purchase, and that he, defendant, visited it solely to see whether it was intact and unmolested. Defendant testified further that he secured the keys to the padlocks from the one to whom he had leased the trailer, and that such person was then serving a term in the Ohio Penitentiary.

The only other witness appearing for the defendant was a medical doctor who was treating the defendant professionally. He testified as to defendant's poor physical condition due to a heart ailment, hardening of the arteries and other disorders of internal organs. He said further that the defendant was incapable of strenuous physical activity.

It is a well established principle of law that a statute,

under one application, may operate unconstitutionally, but, under another and different application, its operation may be perfectly valid. Such was the pronouncement of the Supreme Court of the United States in the cases of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S., 282, 66 L. Ed., 239, 42 S. Ct., 106, second headnote; and *Alabama State Federation of Labor v. McAdory*, 325 U. S., 450, 462, 89 L. Ed., 1725, 1735, 65 S. Ct., 1384, 1390. Or, as was held by this court in the first paragraph of the syllabus of *State, ex rel. Herbert v. Ferguson, Aud.*, 142 Ohio St., 496, 52 N. E. (2d), 980, "where, under one state of facts, the operation of a statute is constitutional, a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional."

To the same effect, see *State, ex rel. Speeth et al., Board of County Commrs., v. Carney, Aud.*, 168 Ohio St., 159, 126 N. E. (2d), 449.

Here, under the state's evidence, the deduction is warranted that this large quantity of pornographic material was possessed by defendant with knowledge of its nature, and that it was held for sale and distribution. The situation differs from one where an individual merely possesses material of that kind for his own private purposes.

Therefore, we think the quoted portions of the statute are constitutional and valid as applied to the defendant under the evidence outlined above.

The instant case is unlike that of *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215. That case involved an ordinance of the city of Los Angeles making it unlawful for any person to have in his possession any obscene or indecent book in any place where books are sold or kept for sale. The court construed the ordinance as fixing strict or absolute criminal liability, without requir-

ing any element of scienter, *i.e.*, knowledge by the defendant bookseller of the contents of the book for the possession of which he was convicted. The majority of the court held that that ordinance, although directed to obscene matter, violated the constitutionally protected rights of freedom of speech and of the press, because it lacked the element of scienter on the part of the bookseller.

Surely the state in the exercise of its sovereign power may enact and enforce legislation designed to protect its people, particularly the young, inexperienced and unsophisticated, from the corrupting and degrading influence of what is plain unmitigated filth.

We are not confronted here with an illegal search and seizure in violation of defendant's constitutional rights. No objection was made by defendant in the trial court to the introduction of the pornographic material taken from the trailer on that ground, and that there may have been an illegal search and seizure was mentioned only casually in the Court of Appeals. *State v. Mapp* (U. S.), 6 L. Ed. (2d), 1081, 81 S. Ct., 1684.

The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

RADCLIFF, MATTHIAS, BELL and O'NEILL, JJ., concur.

TAFT, J., dissents for the reason stated in the majority opinion in *State v. Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, and in the concurring opinion in *State v. Jacobellis*, 173 Ohio St., 22 at page 29.

HERBERT, J., dissents for the reason stated in the opinion in the case of *State v. Mapp*, 170 Ohio St., 427, 166 N. E. (2d), 387.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District sitting by designation in the place and stead of ZIMMERMAN, J.

BELL, J., concurring. The authorities cited in the majority opinion herein clearly support the proposition stated in the first paragraph of the syllabus to the effect that, under one application, a statute may operate unconstitutionally yet, under another and different application, may operate validly.

Possession of nearly 20,000 copies of pamphlets, photographs and drawings which, to give them their most charitable description, can only be designated as hard-core pornography could be for one purpose and one purpose only—dissemination for profit. The intent of the Legislature in enacting Section 2905.34, Revised Code, must have been to prevent such dissemination or some other equally pernicious guilty purpose; it can not be assumed that the Legislature intended a deliberate invasion of personal freedoms.

Such an intent is a far cry from intending to make guilty under this statute a person who has in his personal library an isolated example of what might be many, or even by a few, be termed obscene. It is a far cry from intending to make guilty a clerk of courts who accepts for filing an exhibit or a judge or juror who later examines such exhibit, knowing or believing it to be obscene. All would be equally guilty if we assume that the Legislature intended that no guilty purpose need accompany the knowingly possessing.

In drawing a line between concepts as basic as personal freedom and the police power, a fine-pointed pen is often required. But fine or broad, the line must be drawn with reason. If, by judicial interpretation, that line can, with reason, be drawn so as to accomplish the pur-

pose sought by the exercise of the police power and at the same time protect the freedom of the individual, it should be so drawn.

The interpretation given this statute herein, and in the majority opinion in *State v. Jacobellis*, 173 Ohio St., 22, is, in my opinion, the only reasonable interpretation that can be given it. If, by implying the elements of guilty knowledge and guilty purpose, the salutary effect that it may be hoped the statute will have on our society can be given impetus, then that implication should be made. To interpret it, on the other hand, in such a way as to make mere knowingly possessing unlawful without either guilty knowledge or purpose accompanying that possession would, of necessity, make its application unconstitutional as the majority of this court felt was the result of such application in *State v. Mapp*, 170 Ohio St., 427.

APPENDIX 13.

OPINION OF THE U. S. DISTRICT COURT, N. D. ILLINOIS, E. D., ZENITH INTERNATIONAL FILM CORPORATION vs. CITY OF CHICAGO, (183 F. Supp. 623).

CAMPBELL, *Chief Judge*.

* * *

From the opening scene in this motion picture, the appeal to the prurient interest is presented in a tantalizing increasing tempo which intensifies the sexual desire to its apex when the wife and archeologist engage in the anticipated act of sexual intercourse in her bedroom.

The actual bedroom scenes begin, after a series of moonlight scenes which serve to whet the sexual appetite, with the impassioned lovers frenziedly undressing one another in such a manner as to suggest complete nakedness.

Upon entering the bed and as the acts begin, the film registers every possible emotion of sexual feeling and pleasure on the wife's face and then shifts to her writhing, contorted arm, hand and body as sexual climax approaches and occurs.

Those scenes immediately following suggest sexual gratification as the lovers lie in bed in apparent naked contentment and then, later, as they playfully disport in the same tub.

I find that the motion picture, viewed as a whole, is completely centered around and dominated by sexual play and gratification.

(9) For these reasons, I find that the motion picture, "The Lovers," appeals to the prurient interest, is obscene, and therefore censorable under the Chicago ordinance.

* * *

APPENDIX 14.

CLEVELAND PLAIN DEALER, Thursday, November 12, 1959
CLEVELAND NEWS, Wednesday, November 11, 1959

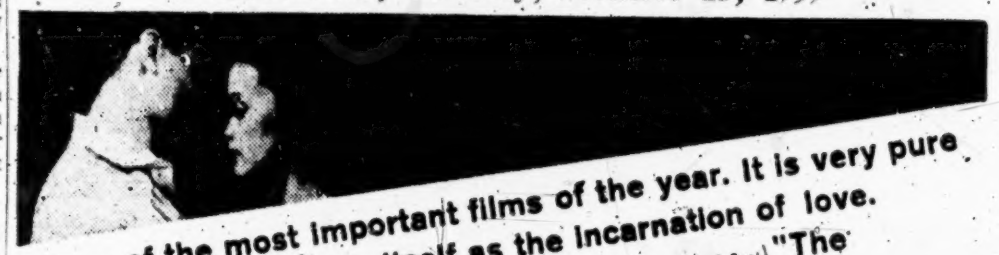
When all conventions explode ... in the most daring love story ever filmed!

The LOVERS

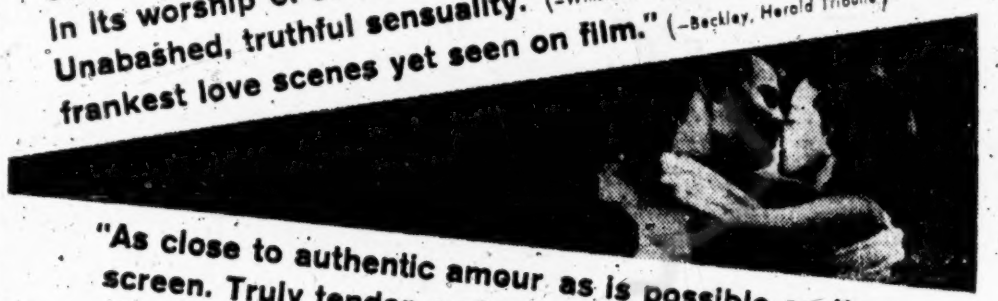
starring Jeanne MOREAU - Jean Marc BORY

HEIGHTS ART THEATRE

CLEVELAND NEWS, Thursday, November 12, 1959



"One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (-Winsten, New York Post) "The frankest love scenes yet seen on film." (-Beckley, Herald Tribune)



"As close to authentic amour as is possible on the screen. Truly tender and compassionate examination of a sudden torrid love affair. Jeanne Moreau is superb." (-Weiler, New York Times) "Most revealing story of illicit love that has yet come out of France." (-Hale, Daily News)

the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Starts TONIGHT!

HEIGHTS Art Theatre 2781 EUCLID HTS. BLVD. Phone YE 2-5955 FREE PARKING!

Show Time: 7:15, 9:05

GET MORE OUT OF LIFE—GO OUT TO A MOVIE MEMBERS CLEVELAND

THE CLEVELAND PRESS, Thursday, Nov. 12, 1959 APPENDIX 16.

NEW YORK LOVES "THE LOVERS"

"As close to authentic amour as is possible on the screen–Truly tender and compassionate examination of a sudden torrid love affair...Jeanne Moreau, is superb."
— Weiler, New York Times

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."—Alpert, Saturday Review

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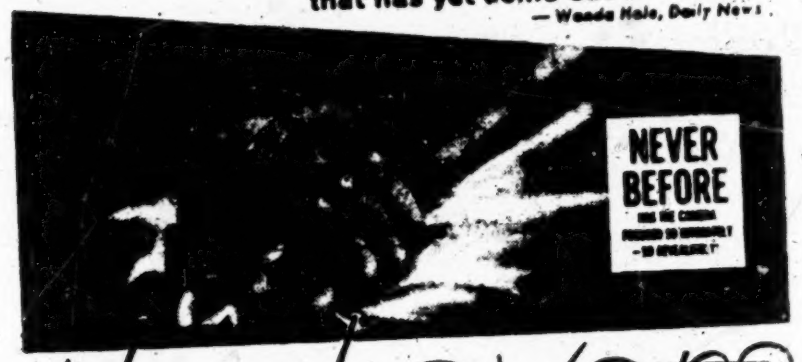
"The frankest love scenes yet seen on film."
— Beckley, Herald Tribune

"The most revealing story of illicit love that has yet come out of France."
— Wanda Hale, Daily News



the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Starts TONITE

HEIGHTS

Show Time: 7:15; 9:05

APPENDIX 17.

CLEVELAND NEWS, Friday, November 13, 1959

NEW YORK LOVES "THE LOVERS"

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. . . and THE CLEVELAND NEWS ALSO LOVES "THE LOVERS." says Arthur Spaeth: **"Artful cinema. I salute the sensitivity and excellently cinematic virtues of an adult observation of love . . . Uncommon picturization . . . a remarkable acting company."**

the Lovers

Starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Now Showing! HEIGHTS TONITE AT 6:45, 8:15, 10:00

APPENDIX 18.

CLEVELAND PLAIN DEALER, Friday, November 13, 1959

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the Lovers

Starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Now Showing! HEIGHTS TONITE AT 6:45, 8:15, 10:00

ADVENTURE IN FILTH

Full Condemnation for 'The Lovers'

By W. WARD MARSH

"The Lovers"

Heights-Art

* * *

"THE LOVERS" ("Les Amants") drama in Cinemascope from France with English titles, directed by Louis Malle, who also wrote the screen play. From the novel, "Pointe de Lende-main," by Dominique-Vivant. A Zenith International presentation played by the following cast:

Jeanne.....Jeanne Moreau
Henri.....Alain Cuny
Raoul.....Jose-Luis de Villalonga
Bernard.....Jean-Marc Bory
Maggy.....Judith Magre
Servant.....Gaston Modot

When I began this business of looking seriously at motion pictures, I honestly never dreamed that I would have to review a "stag" movie.

This, then, is my first review of such picture and the first of its kind I have ever seen. I lay no claim to purity. At the same time, I want no part of filth . . . least of all on the motion picture screen.

Without its shockingly nasty climax, "The Lovers" would be shunned by all moviegoers. With it, the prurient-minded will have a ball.

I have read out-of-town reviews by the so-called cognoscenti and the intelligentsia who have declared "The Lovers" to be screen poetry. The verdict here: a dull picture until it turns to screened pornography, and then it becomes nauseous.

The Story

Suppose for the moment I condone its pornographic sequences — which I do not! — there are other entirely destructive moral issues which are almost as unacceptable, or will be unacceptable to people who consider themselves as decent folk.

This other phase can be most easily exposed by relating quite briefly the story of "The Lovers."

A married woman, living in a major city, regularly visits Paris. I base my estimate of the size of her city by the fairly large newspaper plant which her husband owns and operates.

He apparently doesn't care much for her. So, she goes to Paris to see a long-time friend and to have a mild flirtation with a polo player. It is mild compared with what happens later in the film.

When her husband insists that she invite these friends down to their rural chateau, she does this but is late arriving home because her car breaks down. She is given a lift by a sour-faced archaeologist. Husband insists that the new guest remain for the night.

This guest is left downstairs to play records, have a nightcap, etc., but he strolls over the estate in the moonlight and is soon joined by the wife in chamber attire.

Before a cloud can obscure the moon they are in each other's arms. This continues as they stroll, as they take a boat ride and as they return to the house where the guest is ushered into her room while she tucks her small daughter in for the night and tells the sleeping child that she is her love.

Now, aside from the chamber scene which is at once disgusting and revolting, adultery is more than pardoned when the pair of lovers ride off into whatever their future holds for them, or, possibly as long as the gasoline holds out.

The early chapters are dull beyond belief. The husband's attitude toward his wife is so contrived that adultery can be anticipated long before it happens.

Perhaps the "surprise," and the quotes are needed, comes because one has expected the virile polo player to be the chamber guest when actually it turns out to be the archaeologist whose manliness is distinctly open to question.

None of the players is worth a line of type.

By exhibiting "The Lovers" the Heights-Art has done incalculable harm to all other theaters showing decent motion pictures.

"The Lovers" lights every censorship torch. It will be a very great calamity when or if all other good, clean, honest, decent motion picture theaters have to atone for the curse which one theater can put upon them all.

CURLY-HAIRED VICTOR MATURE is bewitched and then virtually scalped by Hedy Lamarr as the Biblical siren of the late Cecil B. DeMille's successful movie being revived by Loew's State Theater today. It's "Samson and Delilah," in which Mature portrays the mighty warrior who fights the Philistines single-handed.

AMUSEMENTS

Public Hall—Sun., Nov. 15, 5 p.m.
115 Member
VIENNA PHILHARMONIC ORCHESTRA
Herbert Von Karajan, Conductor
Program

Symphony No. 5 in C Minor, Opus 67—Ludwig von Beethoven
Till Eulenspiegel's Merry Pranks, Opus 29—Richard Strauss
Suite from "The Water Music"—Georg Friedrich Handel
Tickets: $5.00, 4.00, 3.00, 2.00

MUSIC HALL ONE NIGHT ONLY WED., NOV. 18 AT 8:30

DIRECT FROM WORLD-FAMED HOLLYWOOD BOWL
Miss Patricia Morison
in the
STEPHEN PAPICH PRODUCTION
of
GAY '90s NITE
with The Gaslight Orchestra • Hapsburg Ballroom Octet
Parc Davis Soubrette • Highlights from "The Merry Widow" Musicale
The Most Exciting New Attraction!
ON NATIONAL TOUR
SEASON'S TOP MUSICAL BOUQUET
★ ★ ★ COMPANY OF 62 ★ ★ ★
FUN FOR ALL THE FAMILY
Tickets $4.50-4.00-3.00-2.50-2.00

Cleveland Opera Association—2816 Euclid Ave.—MAin 1-8826
Mail Order Accepted—Tickets at Burrows, 419 Euclid
For your convenience tickets may be ordered and charged through Higbee's Music Center—CH 1-4400

BURLESQUE

AMUSEMENTS

FIRST TIME IN CLEVELAND
The Comedy Sensations of The Sophisticated Set
TONY & EDDIE
The Raves Are International
• 2 Yea
• 1 Year

GARDEN NOW
FIVE GATES TO HELL
GRUEL!
also "OREGON TRAIL"

LYCEUM NOW
FIVE GATES TO HELL
GRUEL!
also "OREGON TRAIL"

LaSALLE NOW
FIVE GATES TO HELL

the personality she has evolved to replace the "little girl" she once protected is tainted with just the right amount of sophistication. Miss Caron's acting effects are more consciously and artfully achieved than many hitherto have perceived.

Cesare Danova plays the soldier-of-fortune. He acts well, especially in the renunciation scene, but he is so unprepossessing! European women, however, seem to like him.

I'm not quite sure what Johnson intended by the gangster and the baron whom the gangster takes under his wing. That Hollywood [redacted] shots have used gangsters in [redacted] hensible capacities has been [redacted] before (most recently [redacted] *Kurfs*). But Willie [redacted] the type. As for [redacted] son depicts [redacted] tatonic alcoh[redacted] then the baron [redacted] lovers should never [redacted] kills the gangster who [redacted] kill the soldier-of-fortune, [redacted]n raises symbolical intimations of sociological ideas and issues he never develops.

Nor does he make Willie's character clear. I'm willing to go along with those who say Willie's failure to consummate the marriage was a recoiling self-immersion in work after too many Hollywood dames. Others, I realize, leapt to a different suspicion.

It would be interesting to know just what Johnson intended originally, what occasioned his various changes of mind; what his opinion is of the picture as it is now. H. H.

THE 400 BLOWS

Written, directed and produced for $65,000 in France by young Louis Truffaut, this little film re-asserts the truism that some juvenile delinquency results from the ignorance, stupidity and selfishness of grown-ups.

The 12-year old boy who here suffers psychic blow upon blow, was born illegitimately to an instinctual ignoramus who [redacted]hen faithless to another lo[redacted] the decency to marry [redacted]chool teacher [redacted] who misinter[redacted]al impulses in the [redacted]

[redacted]able art is required to ani[redacted]ch cliché script situations and [redacted]racter motivations. No such art [redacted]s visible here. The all-important boy-actor (Jean-Pierre Leand) is not too appealing, and the rest of the players are indifferent actors. Henri Decae's black-and-white photography is adequate, but Truffaut's direction is amateur.

However, Truffaut is still very young. And to his credit is the fact that instead of exploiting sex, sensationalism and despair in his first feature film, he elected to deal with subject matter that has human as well as social importance.

LOUISE CORBIN

THE LOVERS

It is pictures such as this that make the commercialism of Hollywood seem relatively wholesome.

The script of *The Lovers* is an unbelievable contrivance to lead up to one scene in which the camera records

at length the facial reactions of a woman during cunnilingus.

Brahms, polo, a beautiful estate outside Dijon, and other socially acceptable *divertissements*, are used to lift *The Lovers* out of the class of "smoker" pornography and into the class of pornography for "cultivated" degenerates.

Louis Malle wrote and directed, and Jeanne Moreau played the wife who, while her husband, Paris lover and child are in the house, gives herself to another man.

They should be ashamed, as should everybody else connected with such low-grade, anti-social money-grubbing.

A SUMMER PLACE

Written, dire[illegible] produced by Delmer Dave[illegible] *Place*, like *Blue Denim*[illegible] teenage sexual inter[illegible] the inadequacies of pa[illegible] ward as justification giving in to sexual desire. we are left to believe the te[illegible] with a baby on the way, will married and make a living runnin[illegible] a summer hotel on an island off the New England coast.

There are other strands in the above story. Arthur Kennedy plays a drunken descendant of a once honorable New England family; Dorothy Maguire is the wife who had never loved him and had had an affair with Richard Egan before *her* marriage (an affair she resumes after 20 years). It is her son by Kennedy who impregnates the daughter Egan had by the wife he married on the rebound from Maguire. Egan's wife, in a badly written role, is overplayed by Constance Ford. The teenagers are played by Sandra Dee and Troy Donahue.

All the above is supposed to take place along the Atlantic coast. It was beautifully photographed in color by Harry Stradling at Carmel, Pacific Grove and Pebble Beach in California.

I can only hope *A Summer Place* will seem as unrealistic to teenagers as it did to me. ELLEN FITZPATRICK

THE SINS OF LOLA MONTES

Max Ophuls' last film, *Lola Montes*, much touted in Europe several years ago, is not being shown here in its original form. Some 40 minutes have been hacked away, following considerable re-editing. The incoherent result, needless to say, is quite different from Ophuls' original conception, which was said to have been modelled upon the unorthodox story-telling de[illegible] of *Citizen Kane*.

[illegible] great pity we are forced to [illegible]ture in such a mutilated [illegible]uch of what remains [illegible] and the English du[illegible] good. The Eastma[illegible] is beautiful, as are [illegible] decor. Indeed, some o[illegible] lighting and virtuo[illegible]rk are breath-taking.

It is impossible to tell whether or not in the original the visuals were matched by effective drama. Certainly there is cinematic style, and more than a hint of adroit acting, especially by Anton Walbrook as King Ludwig of

APPENDIX 21.

BILL OF PARTICULARS, COURT OF COMMON PLEAS.

Responding to the request of the defendant for a bill of particulars, the prosecuting attorney says that, on the trial of the above-entitled cause, the plaintiff will prove:

(a) That the defendant had the said motion picture film in his possession and under his control in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of Heights Art Theatre, a movie house in the City of Cleveland Heights, in which movie house the said motion picture film was located and at which the said motion picture film was exhibited.

(b) That the defendant, in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of the said Heights Art Theatre, exhibited the said motion picture film through the medium and services of a motion picture projectionist who operated a machine commonly known as a movie projector; which projector cast images from the said motion picture film onto a surface commonly known as a movie screen in view of the theater patrons; and which projector caused words, spoken dialogue, music, and other sounds to be transmitted from a sound track on the said motion picture film through an amplifier and made audible to the theater patrons.

JOHN T. CORRIGAN,
County Prosecutor,

By (Signed) THOMAS L. OSBORNE,
(Signed) BERNARD J. STUPLINSKI,
Assistant County Prosecutors.